No. 83-458

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, AND UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

LEONARD SCHAITMAN
SUSAN SLEATER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937 provides that a handler regulated by a market order issued pursuant to the Act may challenge that order in an administrative proceeding before the Secretary of Agriculture (7 U.S.C. 608c(15)(A)). The Act further provides that if a handler is dissatisfied with the Secretary's decision, he may then obtain judicial review of that decision in the appropriate federal district court (7 U.S.C. 608c(15)(B)). The questions presented are:

1. Whether this statutory scheme for reviewing market orders precludes judicial review of milk market orders at the behest of ultimate consumers of milk products, who are neither regulated handlers granted a right of review by statute, nor producers, the direct beneficiaries of the market orders.

2. Whether ultimate consumers of milk products, who assert interests that are either antithetical to the interests Congress sought to promote in the Act or are not implicated by the market orders challenged in this litigation, lack standing to maintain this lawsuit.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption, Deborah Harrell, Ralph Desmarais, Zy Weinberg, and Joseph Oberweis were plaintiffs in the district court and appellants in the court of appeals, and are respondents here. The National Milk Producers Federation, the Associated Milk Producers, Inc., and the Central Milk Producers Cooperative were granted leave to intervene as defendants in the district court, appeared as appellees in the court of appeals, and, pursuant to Rule 19.6 of the Rules of this Court, are respondents in this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 698 F.2d 1239. The opinion of the district court (Pet. App. 53a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on January 21, 1983. A petition for rehearing was denied on April 19, 1983 (Pet. App. 50a).[1]

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[1] The government's petition for rehearing was denied on March 28, 1983 (Pet. App. 47a). The time for filing a petition for a writ of certiorari did not begin to run, however, until the court of appeals denied the petition for rehearing filed by the intervenor-appellees. See Rule 20.4 of the Rules of this Court.

On July 8, 1983, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 16, 1983. The petition was filed on that date and was granted on November 28, 1983 (J.A. 82). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, are set forth at Pet. App. 69a-95a.

STATEMENT

This case arises out of the federal regulation of the milk industry through the use of market orders, each of which consists of a series of complex regulations establishing the minimum prices handlers must pay for farmers' milk in a given geographic region. The market orders are issued by the Secretary of Agriculture under authority of the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The issue in this case is the propriety of a challenge to milk market orders by unregulated ultimate consumers of milk products who are nowhere included in the statutory scheme for administrative and judicial review of market orders and whose asserted interests are antithetical to the interests Congress sought to promote in the statute.

1. a. Section 8c of the AMAA, 7 U.S.C. 608c, authorizes the regulation of numerous agricultural commodities and products, including milk.[2] One of Congress's primary

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[2] Statutory authorization for the issuance of milk market orders (then called licenses) was first contained in the Agricultural Adjustment Act of 1933 (AAA), ch. 25, § 8(3), (4), and (5), 48 Stat. 35. See *Zuber* v. *Allen*, 396 U.S. 168, 174-175 (1969). The legality

purposes in enacting the AMAA was to end destructive price competition in the dairy industry, the structure of which "is so eccentric that economic controls have been found at once necessary and difficult." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 529 (1949).

The ruinous competition among dairy farmers that concerned Congress centered on fluid milk sales because such sales bring higher prices than do sales of milk for "surplus" use, *i.e.*, use in manufacturing butter, cheese, and other milk products. See *Zuber* v. *Allen*, 396 U.S. 168, 172-176 (1969); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 548-550 (1939); *Nebbia* v. *New York*, 291 U.S. 502, 515-518, 530 (1934).[3] One of the principal tools Congress used to end farmers' counterproductive competition for fluid milk sales and to

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of this program was cast into doubt by the Court's decision in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). "With its agricultural marketing program resting on quicksand, Congress moved swiftly to eliminate the defect of overbroad delegation and to shore up the void in the agricultural marketing provisions." *Zuber* v. *Allen*, 396 U.S. at 175. It did so by enacting significant amendments to the AAA in 1935 (Act of Aug. 24, 1935, ch. 641, 49 Stat. 750 *et seq.*). The market order program was again put in jeopardy when in *United States* v. *Butler*, 297 U.S. 1 (1936), the Court invalidated certain taxing provisions of the AAA. Congress responded by passing the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, which reenacted the market order provisions of the 1935 legislation. The provisions of the AMAA at issue in this litigation are in all material respects unchanged from the 1935 legislation. For convenience, we discuss in this brief the provisions of the AMAA, except where specific reference to earlier legislation is required.

[3] Fluid milk must be consumed relatively quickly after it is produced because it is a naturally fertile field for the growth of bacteria. If it cannot be marketed quickly in fluid form, it must be manufactured into cheese, butter, powder, or other milk products that can be stored for longer periods. Milk that cannot be disposed of in fluid form is referred to in the trade as "surplus," and it commands a lower price than fluid milk because it is manufactured into products that compete directly with similar products produced at various times from across the nation. See Pet. App. 3a.

guard against its recurrence was the market order system authorized by 7 U.S.C. 608c. The "essential purpose of [the market orders regulating commodities is] to raise producer prices." S. Rep. 1011, 74th Cong., 1st Sess. 3 (1935). With respect to milk, such orders provide a method by which the benefits of the desirable fluid milk market and the burdens of the surplus milk market are fairly and proportionally shared among all dairy farmers supplying a given market. See *Nebbia* v. *New York*, 291 U.S. at 517-518.

Under the authority of the Act, 45 milk market orders are currently in effect, each encompassing a different region of the country and collectively including most of the nation (see 7 C.F.R. Pts. 1001-1139).[4] Through these orders, the federal government regulates the handling and pricing of nearly 70% of all milk produced in the United States and more than 80% of all Grade A milk (Agricultural Marketing Service, U.S. Dep't of Agriculture, Statistical Bulletin No. 698, *Federal Milk Order Statistics—1982 Summary*, at 16). Grade B milk, which cannot be sold for drinking purposes, is not regulated under federal orders (see 45 Fed. Reg. 75958 (1980)). The market orders establish minimum prices that handlers (those who process the raw milk) must pay to producers (dairy farmers). Farmers are free to bargain competitively for prices higher than the market order minimums, and the orders do not regulate the retail price of milk.

The order prices are determined according to a classification system based on the end use to which handlers put the raw milk. See 7 U.S.C. 608c(5)(A); 44 Fed. Reg. 65990 (1979). If the milk is used in hard manufactured products such as cheese, butter, dry whole milk,

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[4] At the time this action was brought, there were 47 milk market orders in effect. Since that time, the Secretary has promulgated two orders that had the effect of merging six prior orders into two (47 Fed. Reg. 53693 (1982); 48 Fed. Reg. 52869 (1983)), and, in addition, he has promulgated two orders covering previously unregulated territory (46 Fed. Reg. 28611 (1981); 47 Fed. Reg. 11495 (1982)).

or nonfat dry milk, a handler pays at least the Class II minimum price (*ibid.*).[5] This Class II minimum price changes monthly and equals the average price paid for unregulated, Grade B milk in the most productive dairy regions of the country (45 Fed. Reg. 75958-75959 (1980)). For milk used as fluid milk, a handler pays the higher, Class I minimum price (44 Fed. Reg. 65990 (1979)). The Class I minimum price varies in each order area, but reflects transportation costs plus a premium over the Class II price of 90 cents per 100 pounds of milk (45 Fed. Reg. 75959 (1980)). Under all but three of the market orders, all handlers' minimum price payments for regulated milk used in the different classes are pooled, and farmers are paid from the pool on the basis of the weighted average price received for milk in all uses—the "blend price" (*ibid.*). Thus, handlers pay "in accordance with the form in which or the purpose for which [milk] is used," as required by 7 U.S.C. 608c(5)(A); farmers, on the other hand, receive a uniform, blend price, "irrespective of the uses made of such milk," as required by 7 U.S.C. 608c(5)(B)(ii). These statutory and regulatory mechanisms create and maintain orderly marketing conditions by permitting all farmers to share in the benefits of the desirable fluid market and equalizing the burdens of the surplus market.

b. Reconstituted or recombined milk is manufactured by mixing milk powder with water. See 44 Fed. Reg. 65990 (1979). Consumers can purchase milk powder and reconstitute it themselves. Such consumer-reconstituted milk is not the subject of this litigation. Instead, respondents brought this action to challenge the market order regulation of milk powder that a *handler* reconstitutes into fluid milk.

Since 1964, the Secretary has treated handler reconstituted fluid milk as a Class I product in order to ensure

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[5] Some market orders contain a three-class pricing system. For all practical purposes, however, this case concerns only the difference between Class I and Class II prices (see Pet. App. 3a n.7).

the integrity of the end use classification system. See 29 Fed. Reg. 9010 (1964). The Secretary reconsidered the issue in 1968 and again determined that regulation of reconstituted milk was required to assure uniform and adequate minimum prices and to prevent the recurrence of destructive competition among farmers. The Secretary explained (34 Fed. Reg. 16883 (1969)):

> Primarily the problem relates to the conversion by a handler of a product, such as nonfat dry milk, normally priced as a surplus use into another product for Class I use. In addition, the possible entrance into the market of reconstituted products from unregulated sources enlarges the problem.
>
> The potential of these conditions for disruptive influence on the market for producer milk is extremely serious because disposition of a product for a Class I use but pricing it in a surplus price class undermines the classified pricing system.
>
> * * * * *
>
> The objectives of classified pricing are uniformity of pricing according to form or use and providing an adequate return to producers for the fluid market. Therefore, the widespread disposition of filled milk made from reconstituted skim milk, if the skim milk were not subject to some "equalizing" payment, could lead to total defeat of such objectives. Certainly, the classification and pricing plan should protect the Class I market from the potential effects of competition with products produced from the market's own surplus or similar products produced elsewhere at a manufacturing price when used in filled milk.
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> * * * * *
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> In this case payment to the producer-settlement fund at the difference between the Class I price and surplus price is necessary not only to assure competitive equity among handlers but also to insure the integrity of the classified pricing system as a means of assuring reasonable prices to producers.

Accordingly, each of the regional market orders defines reconstituted milk that is used for drinking purposes as "fluid milk," thereby including it in Class I (see 44 Fed. Reg. 65990 (1979)). Under this system, handlers pay at least the minimum Class I price for all milk products used for fluid consumption. In part, this pricing system is accomplished through a series of assumptions and adjustments known as "down allocations" and "compensatory payments" (see 45 Fed. Reg. 75956-75957 (1980); Pet. App. 4a-5a), all of which operate to ensure that handlers pay producers according to the end use to which the producers' milk is put by the handlers (see J.A. 45). The net effect is that handlers who reconstitute dried milk into fluid milk may be required to make a "compensatory payment," equal to the difference between the Class I and Class II prices, into a pool for distribution to producers. It is this compensatory payment to which respondents object, contending that it makes reconstituted milk uneconomical for handlers to produce (see Br. in Opp. 6-7).

2. The Secretary issues a market order only after rulemaking proceedings that include public notice and the opportunity for a hearing (7 U.S.C. 608c(3) and (4)). The evidence introduced at the hearing must show "that the issuance of such [proposed] order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity" (7 U.S.C. 608c(4)). But before a milk market order can become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and at least two-thirds of the dairy producers in the affected region (7 U.S.C. 608c(8), 608c(5)(B)(i)). If the handlers withhold consent, the Secretary may nevertheless impose the order if he determines that it is "the only practical means of advancing the interests of the producers" and at least two-thirds of the producers consent (7 U.S.C. 608c(9)(B)). An order may be terminated by the Secretary (7 U.S.C.

608c(16)(A)) or by a majority of the producers in an order area (7 U.S.C. 608c(16)(B)).

Because this statutory scheme gives handlers considerably less control than producers over the adoption and retention of market orders, the Act expressly provides for administrative and judicial review of market orders at the behest of handlers. Specifically, 7 U.S.C. 608c(15)(A) provides that "[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom." If dissatisfied with the Secretary's ruling on the administrative petition, the handler may seek judicial review of "such ruling" in the appropriate district court (7 U.S.C. 608c(15)(B)). The Act contains no other provisions for the review of market orders. The pendency of handler-initiated administrative or judicial review proceedings may not "impede, hinder, or delay" the government from obtaining relief in an enforcement action brought under 7 U.S.C. 608a(6) (7 U.S.C. 608c(15)(B)).

3. In December 1980, respondents[6] commenced this action in the United States District Court for the District of Columbia, seeking a declaration that all of the milk market orders, insofar as they apply to reconstituted milk products and milk powder used to make reconstituted milk products, are invalid, and an injunction prohibiting petitioners from "implementing" the regulations (which have been in effect since 1964) (J.A. 20). The plaintiffs, who included three individual consumers of fluid dairy products, sought to have the Secretary amend the milk market orders so that reconstituted milk would no longer be deemed a Class I product even if a handler

[6] As used in this brief, "respondents" refers to the plaintiffs in the district court and does not include the intervenor-defendants who are respondents in this Court by virtue of Rule 19.6 of the Rules of this Court.

used it as fluid milk.[7] In their complaint, the individual consumers alleged that "[t]he existing regulations have denied them the opportunity to purchase a lower price reconstituted milk product in lieu of raw fluid milk" (J.A. 12).[8] Joseph Oberweis, a handler regulated by one of the market orders, and the Community Nutrition Institute, a self-described "nonprofit charitable organization" (J.A. 11), joined the individual consumers as plaintiffs.

Ruling on cross-motions for summary judgment, the district court dismissed the complaint for lack of jurisdiction (Pet. App. 53a-67a). Citing *Rasmussen* v. *Hardin*, 461 F.2d 595, 599 (9th Cir.), cert. denied, 409 U.S. 933 (1972), and *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979), the district court con-

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[7] Prior to filing suit, respondents had petitioned the Secretary to hold a rulemaking hearing on the same proposal (see 44 Fed. Reg. 65990 (1979)). The Secretary published a Notice of Request for Hearing and asked for comments (*ibid.*). Subsequently, the Secretary published a preliminary impact analysis of respondents' proposal and invited comments (45 Fed. Reg. 75956 (1980)). Respondents filed this action shortly thereafter. Later, on April 7, 1981, the Secretary determined not to hold a rulemaking hearing because respondents' proposal would not further the purposes of the Act and could harm the dairy industry (J.A. 57-63). As a result of this action by the Secretary, the court of appeals held that that portion of respondents' complaint challenging the Secretary's "inaction" on their rulemaking request (J.A. 18, 19, 20) had become moot (Pet. App. 32a n.93). In its present posture, the case is limited to respondents' right to challenge the market orders on their merits.

[8] The complaint described the individual consumers as follows (J.A. 12):

> Plaintiffs Harrell, Desmarais and Weinberg are consumers of fluid dairy products. Due to inflation, they have become extremely cost-conscious and routinely seek to decrease food expenditures without sacrificing taste or the nutritional value of their diet. The existing regulations have denied them the opportunity to purchase a lower priced reconstituted milk product in lieu of raw fluid milk. If such lower priced milk were available they would purchase it.

cluded that Congress intended to preclude ultimate consumers from seeking judicial review of milk market orders (Pet. App. 65a-66a). The district court also held that the consumers lacked standing because, even if the regulations were changed, too many other variables could affect the retail prices paid by consumers for reconstituted milk; thus, the court concluded that "any benefit to the [consumer] plaintiffs from the proposed changes in the regulations is [too] hypothetical and speculative" to confer standing (*id.* at 61a). In addition, the district court concluded that the interest asserted by the consumers—lower prices for one type of fluid milk—was outside the zone of interests protected by the AMAA. The relevant provisions of the statute, the court noted, were intended to protect consumers only against rapid or excessive price increases and against prices above the parity level (*id.* at 62a-64a). Because those interests were not implicated in this case, the court held that the statute did not confer standing on these consumers (*id.* at 64a). Finally, the district court dismissed the milk handler because he had failed to exhaust his administrative remedies under 7 U.S.C. 608c(15) (Pet. App. 66a-67a).

4. A divided panel of the court of appeals affirmed in part and reversed in part, and remanded the case for a decision on the merits. The court of appeals agreed with the district court's dismissal of the milk handler and the nutrition organization (Pet. App. 27a-33a). The court of appeals held, however, that the district court had erred in dismissing the complaint of the individual consumers (*id.* at 12a-26a).

With respect to preclusion of review, the court of appeals declined to follow *Rasmussen* v. *Hardin*, *supra*, concluding that the Ninth Circuit's analysis of the statutory structure of the AMAA and its purposes did not reveal "the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review" (Pet. App. 27a n.75). As for

standing, the court concluded that the individual consumers had satisfactorily alleged injury in fact by claiming that the regulations deprive them of a lower priced alternative to whole milk and that the absence of manufacturer reconstituted milk results in seasonal shortages in the milk supply (*id.* at 14a). The court repeatedly questioned whether the consumers' allegations of injury and redressability were capable of proof, but it concluded that they were sufficient to require a trial on the merits (*id.* at 14a, 16a, 17a-19a).

The court of appeals also held that the concerns of the individual consumers in this case were within the zone of interests protected by the AMAA. The court of appeals rejected the district court's reliance on the AMAA's legislative history to determine the zone of interests arguably protected by the statute, concluding that plaintiffs are "only required to assert an interest 'which is *arguable from the face of the statute*'" (Pet. App. 22a (emphasis in original), quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978)), and that the individual consumers "have clearly done this much" (Pet. App. 22a). Thus, the court of appeals not only chastised the district court for "examining the legislative history in great detail" (*id.* at 23a), but in fact declined to examine it at all. Finally, while noting that the individual consumers' asserted injury "is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk" (*id.* at 25a), the court of appeals ruled that the consumers' claim was not barred as a generalized grievance (*id.* at 25a-26a).

Judge Scalia dissented in part. Judge Scalia concurred in the court of appeals' dismissal of the organizational plaintiff and the handler but concluded that the individual consumers lacked standing, and accordingly he would have affirmed the judgment of the district court in its entirety (Pet. App. 35a-44a). In his view, the consumers' interests fall outside the zone of interests arguably pro-

tected by the AMAA. Judge Scalia placed considerable weight on the fact that the individual consumers are "indirect general beneficiaries" of the AMAA (*id.* at 38a) and observed that "where there is a direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law, the claim of the indirect general beneficiaries to be congressionally designated 'private attorneys general' is weak indeed" (*ibid.*). As applied to this case, Judge Scalia thus reasoned that (*id.* at 38a-39a):

> The direct beneficiaries of milk marketing orders under the Agricultural Marketing Agreement Act (AMAA) are milk producers. * * * On the other side of the ledger, the direct beneficiaries of any limitations upon the Secretary's authority with regard to milk marketing orders are the milk handlers who pay the artificially established prices. * * * In such a situation, where the narrow class immediately affected by both agency excess and agency omission is readily identifiable, I do not believe that a more remote beneficiary class as generalized as the one here (*viz*, all consumers of fluid milk products—which cannot exclude many of the nation's households) can be found to meet the zone of interests test.

SUMMARY OF ARGUMENT

I. Respondents brought this action under the general judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* APA review is unavailable, however, when the relevant statute precludes judicial review. 5 U.S.C. 701(a)(1). Preclusion may be inferred from a statute's language, purposes, and legislative history. See, *e.g.*, *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970).

The Agricultural Marketing Agreement Act of 1937 provides a detailed and specific procedure for administrative and judicial review that is available only at the be-

hest of handlers, the parties directly regulated by the market order provisions and thus the parties best situated to litigate any claim of agency excess. The legislative history demonstrates that the statutory scheme was carefully designed to balance the competing interests of handlers in having an avenue for the redress of grievances with the government's interest in uninterrupted functioning of the regulatory program. Moreover, the legislative scheme, by requiring initial presentation of handlers' challenges to the Secretary of Agriculture, ensures that the courts will have the benefit of the Secretary's expertise in adjudicating claims arising in the context of this complex regulatory statute. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946).

Consumer suits would effectively nullify Congress's direction that the remedy for any handler's grievance "in the first instance must be sought from the Secretary of Agriculture" (*United States* v. *Ruzicka*, 329 U.S at 294). Consumer suits would enable handlers to evade the administrative exhaustion requirement by resort to consumer "front-men"; indeed, this case vividly illustrates the potential for such abuse of the legislative scheme. Respondent Oberweis was dismissed for failure to exhaust his administrative remedies as a handler (Pet. App. 31a-33a). Yet if the consumers' suit sanctioned by the court of appeals were to proceed, Oberweis would still have his claims adjudicated without first invoking the administrative process. Since all handlers are consumers or are ultimately owned or operated by consumers, allowing consumer suits would destroy Congress's carefully balanced scheme for administrative and judicial review.

There is no reason to visit such disruption upon the legislative scheme, because the interests of consumers are entirely derivative of the interests of handlers and can be protected in handler-initiated review proceedings brought under 7 U.S.C. 608c(15). Thus, the rationale for the usual presumption in favor of reviewability—ensuring a mechanism for realization of the statutory

objectives—is absent here, because the issue is not whether judicial review is entirely foreclosed, but instead whether review at the behest of a particular plaintiff is precluded. See, *e.g.*, *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 23. When Congress has provided a comprehensive scheme for administrative and judicial review that affords an opportunity for complete resolution of a controversy, the courts should be chary of fashioning additional remedies. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

Finally, the interests of consumers are totally different from the "definite personal rights" of producers, rights that are "not possessed by the people generally." *Stark* v. *Wickard*, 321 U.S. 288, 304, 309 (1944) (footnote omitted). Accordingly, there is no justification for extending *Stark*'s rationale for producer-initiated suits to consumer suits. Producers are the primary beneficiaries of the AMAA, and their interests are generally antagonistic to those of handlers. Unlike consumers, therefore, producers cannot rely on the parties regulated by the statute to protect their interests, and allowing them to maintain their own suits does no violence to the Act's purposes.

II. Closely related to the question of preclusion of review is the court of appeals' erroneous conclusion that the individual consumers adequately demonstrated their standing to maintain this action. Of course, if the Court agrees with our submission that Congress intended to preclude *all* consumers from seeking judicial review of market orders, it need not reach the issue of respondents' standing. But, at minimum, examination of the language and legislative history of the AMAA clearly indicates that Congress did not intend to protect the interests asserted by the individual consumers in this litigation. In addition, respondents failed to demonstrate injury-in-

fact, they are attempting to litigate a generalized grievance shared by virtually every household in the nation, and it is entirely speculative whether any injury they might have suffered is redressable by a court.

A. Respondents' interest in lower prices for reconstituted milk is inconsistent with Congress's primary purpose in enacting the market order provision of the AMAA (7 U.S.C. 608c)—"to *raise* producer prices." S. Rep. 1011, *supra*, at 3 (emphasis added). The court of appeals nevertheless held that respondents' claim falls within the zone of interests to be protected by the AMAA because two policy provisions of the Act mention consumers (7 U.S.C. 602(2) and (4)). But the court failed to analyze the purpose of these provisions; an examination of their structure in light of the Act as a whole, coupled with analysis of the legislative history (which the court of appeals refused even to consider), demonstrates that Congress intended to protect consumers only against unwarrantably rapid or excessive price increases above the parity level. That limited protection for consumers is not implicated in this case, while the interest that respondents do assert is contrary to Congress's intent.

B. In addition to their interest in lower prices, respondents alleged that the challenged market order provisions cause them injury by depriving them of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk. This assertion, however, fails to meet the constitutionally-required showing of injury in fact because respondents did not allege that they or any other consumers have ever been or are likely to be subjected to shortages in fluid milk supplies due to seasonal variations in milk production. This is a fatal defect. See *Warth* v. *Seldin*, 422 U.S. 490, 498-499, 504 (1975). Moreover, any such allegation would be untenable because a number of regulatory mechanisms operate to prevent seasonal fluctuations in milk production from ever affecting ultimate

consumers. Thus, there is no experience within general knowledge or subject to judicial notice of a shortage of milk at the consumer level.

C. Respondents are seeking to litigate interests shared by virtually every household in the nation, a class larger than that of all taxpayers. Such a generalized grievance is "most appropriately addressed in the representative branches" (*Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982)), particularly when the grievance is not only pervasively shared but is also entirely derivative of the direct interests of handlers, for whom Congress has provided an express right of administrative and judicial review.

D. Finally, it is entirely speculative whether the interests respondents seek to advance are redressable by a favorable judicial decision. The retail prices paid by consumers are not regulated and may bear only a marginal relationship to the prices farmers receive for their milk. Moreover, there is no indication that any reduction in handlers' costs would be passed on to consumers. Nor could a judicial decision in this case have any effect on the many intervening factors between market order pricing provisions and the ultimate availability of reconstituted fluid milk that are essential to a showing of the redressability of respondents' grievance.

ARGUMENT

I. ULTIMATE CONSUMERS OF AGRICULTURAL PRODUCTS, WHO HAVE ONLY INDIRECT AND DERIVATIVE INTERESTS IN THE AMAA'S REGULATION OF HANDLERS, MAY NOT SEEK JUDICIAL REVIEW OF AGRICULTURAL MARKET ORDERS

A. Consumer Suits Brought Under The Administrative Procedure Act Are Precluded By The AMAA

1. *Introduction.* Respondents brought this action for review of the market order provisions regulating reconstituted milk under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (see J.A. 11; Br. in Opp. 12 n.16, 15). That Act confers a general right of judicial review upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" (5 U.S.C. 702), but only to the extent that the relevant statute does not preclude judicial review (5 U.S.C. 701(a)(1)). Whether or to what extent a particular statute precludes judicial review is determined not only from its express language, but also from its purpose and legislative history. See, *e.g.*, *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 457-458 (1974); *Barlow* v. *Collins*, 397 U.S. 159, 166-167 (1970). This is so because, as this Court has observed in a case arising under the AMAA, "meaning, though not explicitly stated in words, may be imbedded in a coherent scheme." *United States* v. *Ruzicka*, 329 U.S. 287, 292 (1946).

Moreover, "[a] frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp.*, 414 U.S. at 458. This principle is particularly apt in the context of the present

case, in which the interests respondents seek to assert are merely derivative of the interests of handlers, the parties regulated by the market order provisions in question and the parties for whom Congress has established a "coherent scheme" (*United States* v. *Ruzicka*, 329 U.S. at 292) that provides a complete mechanism for thorough consideration of the issues respondents seek to litigate. Thus, the rationale for the usual presumption in favor of reviewability—ensuring a mechanism for realization of the statutory objectives (see *Barlow* v. *Collins*, 397 U.S. at 167)—is totally lacking in this case. Here, preclusion of consumer suits does not pose any threat to realization of the statutory objectives; instead, it means only that those objectives must be realized through utilization of the specific remedies provided by Congress, and at the behest of the parties directly affected by the statutory scheme. Such an approach is fully consistent with this Court's decisions. See, *e.g.*, *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 23; *Morris* v. *Gressette*, 432 U.S. at 505-507 & n.21; *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977); *Barlow* v. *Collins*, 397 U.S. at 175 n.9 (Brennan, J., concurring and dissenting); *United States* v. *Ruzicka*, 329 U.S. at 293-294; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300-301 (1943).

With these principles in mind, we demonstrate below that congressional intent to preclude consumer attacks on market orders is necessarily found in the AMAA's express provision for judicial review only at the behest of handlers, the parties Congress intended to serve as the direct representatives of the interests respondents assert in this case. This conclusion is reinforced by the disruptive effect that unauthorized consumer actions would have on Congress's carefully crafted scheme for the regulation of agricultural commodities under the AMAA.

2. *The AMAA establishes a special statutory review proceeding available only to handlers.* Judicial review of

market orders issued under the AMAA is, by the terms of the Act itself, available only to handlers regulated by those orders.[9] The Act is explicit and precise in specifying the procedures to be followed by handlers challenging a market order. First, pursuant to 7 U.S.C. 608c(15)(A), a handler must file a written petition with the Secretary. The Secretary must then provide the handler with an opportunity for a hearing, to be conducted in accordance with the Secretary's regulations. Those regulations (7 C.F.R. 900.50-900.71) provide that handler petitions are to be resolved in formal, adjudicatory proceedings before an administrative law judge (see Pet. App. 40a-44a (Scalia, J., concurring and dissenting)). At the conclusion of the formal administrative proceedings, a handler may obtain judicial review of the Secretary's ruling in any federal district court "in which such handler is an inhabitant, or has his principal place of business" (7 U.S.C. 608c(15)(B)). The pendency of handler-initiated review proceedings under 7 U.S.C. 608c(15) "shall not impede, hinder, or delay" the Secretary of Agriculture from obtaining relief to enforce his orders pursuant to 7 U.S.C. 608a(6) (7 U.S.C. 608c(15)(B)).

Congress gave careful consideration to competing interests when it drafted these provisions for administrative and judicial review at the behest of handlers. As originally enacted in 1933, the AAA contained no provisions relating to administrative or judicial review whatsoever. When the AAA was amended in 1935, however, Congress added the special review and enforcement provisions described above. As explained in the legislative history, these provisions were intended to strike an appropriate balance between handlers' interests in having an avenue for review and the government's interest in uninterrupted functioning of the program (S. Rep. 1011, *supra*, at 14 (emphasis added)):

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[9] The limited circumstances under which producers may obtain judicial review of market orders, discussed at pages 30-32, *infra*, have no bearing on this case.

Specific provision is made for administrative and judicial review of orders. No similar provision is contained in the present act. * * *

During the period while any such petition [for review of an order] is pending before the Secretary and until notice of the Secretary's ruling is given to the petitioner, the penalties imposed by the act for violation of an order cannot be imposed upon the petitioner if the court finds that the petition was filed in good faith and not for delay. The Secretary may, nevertheless, during this period, proceed to obtain an injunction against the petitioner pursuant to section 8a(6) of the Agricultural Adjustment Act. * * * *It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms.*

The statutory review and enforcement provisions thus comprise a complete and rounded scheme in which the interests of regulated parties and the interests of the government are simultaneously protected. Given the obvious care taken by Congress in balancing these competing interests, it could not have intended to sanction additional remedies that would upset the statute's delicate balance. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

3. *Sound policy reasons support the conclusion that Congress intended the statutory scheme for administrative and judicial review to be exclusive.* Congress had sound reasons for concluding that attacks on market orders should be considered by the Secretary in the first instance. The questions raised in such attacks are often complex, and their resolution requires an intimate knowledge of the economic and technical factors underlying the marketing of the various agricultural products subject to regulation—*e.g.*, milk, nuts, fruits, vegetables, and hops (7 U.S.C. 608c(2)). The courts have consistently recognized that the AMAA and the market orders issued thereunder create a highly complex and labyrinthian reg-

ulatory scheme. See, *e.g.*, *Zuber* v. *Allen*, 396 U.S. at 172; *Suntex Dairy* v. *Block*, 666 F.2d 158, 166 (5th Cir. 1982), cert. denied, No. 81-2098 (Oct. 4, 1982); *Dairylea Cooperative, Inc.* v. *Butz*, 504 F.2d 80, 82 (2d Cir. 1974); *Blair* v. *Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966); *Queensboro Farms Products, Inc.* v. *Wickard*, 137 F.2d 969, 975 (2d Cir. 1943). It is thus not surprising that "[a] court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing" (*Blair* v. *Freeman*, 370 F.2d at 232); as the court explained in *Queensboro Farms Products, Inc.* v. *Wickard*, 137 F.2d at 975:

> The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government. It affects an industry immense in scope, for dairying is said to be the largest single branch of agriculture in this country with the exception of that of raising livestock for slaughter, the annual money value of dairy products running to billions of dollars.

Congress thus clearly understood that, before judicial intervention is sought, these complex questions must be presented to the Secretary, who possesses the requisite expertise to illuminate and resolve them.[10]

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[10] In *United States* v. *Lamars Dairy, Inc.*, 500 F.2d 84 (7th Cir. 1974), the court refused to permit handlers to bypass the statutory exhaustion requirement. Referring to a series of cases in which another court had temporarily allowed handlers to avoid the statutory scheme, the court observed (*id.* at 86):

> The *Brown* cases illustrate the folly of deviating from the statutory enforcement scheme under the [Act]. The same district judge who had so many doubts as to the applicability of the Act to defendants became totally convinced defendants were handlers, once he had the benefit of the Secretary's opinion. Meanwhile, years passed without defendants' paying into the fund.

This Court recognized the importance of judicial deference to the Secretary's expertise in *United States* v. *Ruzicka, supra.* In rejecting an attempt by a handler to attack for the first time the validity of a milk market order as a defense to a judicial enforcement proceeding brought by the Secretary, the Court stressed the purposes of the statutory review provisions (329 U.S. at 294):

> Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his rulings, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.[11]

The importance of "elucidation" by an expert administrative body is heightened by the vast scope of the regulatory program at issue. The Department of Agriculture advises us that the value of milk handled under the various market orders exceeds an average of $1 billion each month. Moreover, it would seem that the court of appeals' ruling would logically extend to market orders covering other agricultural products. In addition to the 45

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[11] The lower courts have been equally scrupulous in requiring handlers to exhaust the statutorily-prescribed administrative remedy. See, *e.g., Navel Orange Administrative Committee* v. *Exeter Orange Co.*, Nos. 82-4333 and 82-4548 (9th Cir. Nov. 15, 1983); *United States* v. *United Dairy Farmers Cooperative Ass'n*, 611 F.2d 488 (3d Cir. 1979); *United States* v. *Lamars Dairy, Inc.*, 500 F.2d 84 (7th Cir. 1974); *Willow Farms Dairy, Inc.* v. *Benson*, 276 F.2d 856 (4th Cir. 1960); *United States* v. *Ideal Farms, Inc.*, 262 F.2d 334 (3d Cir. 1958); *Panno* v. *United States*, 203 F.2d 504 (9th Cir. 1953); *United States* v. *Turner Dairy Co.*, 166 F.2d 1 (7th Cir.), cert. denied, 335 U.S. 813 (1948); *La Verne Co-op. Citrus Ass'n* v. *United States*, 143 F.2d 415 (9th Cir. 1944).

milk market orders, there are at present 47 market orders regulating such varied commodities as citrus fruits, potatoes, pears, tomatoes, walnuts, dates, and hops. See, *e.g.*, 7 C.F.R. Pts. 905, 910, 911, 931, 945, 965, 984, 987, and 991. Approximately $6 billion worth of fruits, vegetables, and specialty crops were handled under these orders in 1982. Each order deals with the peculiarities of the marketing of the specific commodity regulated in the geographic region covered by the order. The regulation of these commodities is so complex that some orders require adjustments to be made as often as once a week during the marketing season. See, *e.g.*, 7 C.F.R. 907.51, 907.52. The decision below would make the federal courts, acting without benefit of the Secretary's expertise, the arbiters of all the varied and complex regulatory issues that arise under the orders, thereby raising the possibility that the courts could inadvertently cause the very economic chaos that Congress sought to remedy when it enacted the AMAA.[12] Such a result should not be attributed to Congress absent clear and persuasive indication that Congress actually intended it.[13]

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[12] As the court observed in *Blair* v. *Freeman*, 370 F.2d at 232, "[a]ny court is chary lest its disarrangement of such a regulatory equilibrium [under the AMAA] reflect lack of judicial comprehension more than lack of executive authority."

[13] Presumably, it would be within a court's power to secure the benefit of the Secretary's expertise by invoking the doctrine of primary jurisdiction and staying its hand pending the Secretary's consideration of a regulatory issue arising under the AMAA. See, *e.g.*, *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). But there is no warrant for resort to the judge-made doctrine of primary jurisdiction when Congress itself already has specified the precise manner in which agency expertise is to be brought to bear on challenges to the AMAA's regulation of handlers. In these circumstances, invocation of primary jurisdiction, while perhaps necessary as an aid to judicial decisionmaking, would only highlight the underlying flaw in permitting unregulated ultimate consumers to litigate challenges that Congress intended to be brought by

In addition to the need for administrative expertise, Congress had another reason for making the statutorily-prescribed handler review provisions exclusive. As this Court stressed in *United States* v. *Ruzicka*, 329 U.S. at 293, Congress was equally concerned about the disruptive potential of premature litigation:

> Failure by handlers to meet their obligations promptly would threaten the whole [regulatory] scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements. To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance.

Preventing handlers' litigious noncompliance with market orders is essential to the operation of the program.[14]

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handlers under the provisions of 7 U.S.C. 608c(15). Moreover, the primary jurisdiction doctrine would not be a complete solution to the problems that would be caused by bypassing the congressionally-mandated review procedures. As discussed below (see pages 24-25, *infra*), Congress intentionally denied handlers the right to seek interim judicial relief that would interrupt the smooth functioning of the program. Consumer suits brought under the APA, on the other hand, would be subject to no such restrictions, thus enabling consumers to obtain for handlers the very remedies that Congress prohibited handlers from seeking for themselves.

[14] The requirement that handlers pay for milk according to its end use is affirmatively mandated by the Act (7 U.S.C. 608c(5)), as is the payment to farmers of a uniform price irrespective of the uses to which the milk is put by handlers (*ibid.*). To accomplish these statutory directives, handlers make their payments for milk into regional producer settlement funds that are then distributed to farmers (see Pet. App. 3a-4a). The successful operation of the

The Act explicitly contemplates the application of market orders to handlers who have disapproved them (see page 7, *supra*) and likely believe the orders to be contrary to their interests; indeed, the Department of Agriculture advises us that handlers have not agreed to any milk market order since 1941. The importance Congress attached to the government's ability to obtain compliance through enforcement actions even during the pendency of handler-initiated challenges to market orders (7 U.S.C. 608c(15)(B)) is thus apparent.

4. *Consumer attacks on market orders would effectively obliterate Congress's carefully balanced scheme for their review and enforcement.* On only one occasion prior to the filing of this suit have consumers attempted to challenge a market order, and that challenge was rejected on precisely the grounds that we urge here. In *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972), the court held that consumers of a filled milk product were precluded from seeking review of milk market order provisions that effectively raised the price of the product in the same manner that the market order provisions at issue in this case may raise the price of manufacturer reconstituted fluid milk. The court held that " 'clear and convincing evidence' " of an intent to preclude review by consumers could be " 'inferred from [the statutory] purpose' " (*id.* at 599 (quoting *Barlow* v. *Collins*, 397 U.S. at 166-167)). The court went on to explain (461 F.2d at 599-600):

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settlement funds is extremely sensitive to the slightest disturbance and, as a practical matter, is directly dependent upon prompt compliance by all handlers. The default of a single handler causes an immediate breach in the equalization of costs to handlers and a reduction in price to farmers. The unfair advantage gained by a defaulting handler is sufficient to constitute a strong inducement to competitors to make similar defaults. Any impediment to the Secretary's ability to enforce immediate compliance could result in insufficient funds to provide farmers with the income protection Congress intended for them, and so destabilize the nation's fluid milk supply.

> The statute before us does more than provide for administrative and judicial review and name the affected class entitled to seek it. Section 608a(6) provides for enforcement of the Secretary's orders. And Section 608c(15)(B) provides that pendency of administrative or judicial review under that section "shall not impede, hinder, or delay the United States or the Secretary . . . from obtaining relief pursuant to section 608a(6) . . ." It was this language that led the Court to hold, in *Ruzicka*, that grounds for attacking an order under § 608c(15) could not be raised in a § 608a(6) proceeding.
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> To grant consumers standing would be to say that, while Congress regarded it as imperative that a challenge by a *handler* who is directly regulated by a marketing order, first be considered by the Secretary, it was nevertheless the legislative judgment that if advanced by consumers, the same challenge did not require initial scrutiny by the administrative body. There is no basis for attributing to Congress the intent to draw such a distinction. Had Congress intended to allow consumers to attack provisions of a marketing order, it would have required them to pursue the administrative remedy provided in Section 608c(15)(A). By limiting the administrative remedy to handlers, Congress necessarily intended that the judicial remedy be similarly limited in scope.

The Ninth Circuit also noted that consumer suits would be particularly anomalous because they would enable handlers to evade the statutory exhaustion requirement by latching on to consumer "front-men." *Rasmussen* v. *Hardin*, 461 F.2d at 600. This case vividly demonstrates the potential for such abuse of the legislative scheme. Respondent Oberweis, a handler, was dismissed for failure to exhaust his administrative remedies (Pet. App. 31a-33a, 66a-67a). But if the court of appeals' decision to allow the individual consumers to maintain this action stands, Oberweis will still have his claims adjudicated

without first invoking the administrative process. Indeed, it would not be at all surprising if Oberweis were a "cost-conscious consumer," as well as a milk handler, and the decision below would appear to allow for amendment of the complaint to add Oberweis in his new-found capacity as a consumer plaintiff. Cf. *Reade* v. *Ewing*, 205 F.2d 630, 631-632 (2d Cir. 1953). Since even corporate handlers are ultimately owned or operated by consumers, it is readily apparent that the decision below effectively eviscerates the congressionally-mandated restrictions on handlers' actions. No handler need ever again present his grievances to the Secretary even though "Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture" (*United States* v. *Ruzicka*, 329 U.S. at 294). Moreover, consumers or consumer-handlers could seek injunctions against the operation of market orders that "impede, hinder, or delay" enforcement actions even though such injunctions are expressly prohibited in proceedings properly instituted under 7 U.S.C. 608c(15). Thus, consumer suits would effectively nullify Congress's intent, recognized by this Court in *Ruzicka* (329 U.S. at 293-294 & n.3), to "establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." S. Rep. 1011, *supra*, at 14. It is therefore essential to the legislative scheme that 7 U.S.C. 608c(15) remain the exclusive vehicle for testing the validity of market order restrictions imposed on handlers.[15]

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[15] Respondents' petition for a rulemaking hearing (see page 9 note 7, *supra*) is no substitute for the administrative procedures mandated by the statute and available only to handlers. As the court of apepals noted (Pet. App. 33a (emphasis in original)), the complaint in this case "challenge[s] the Secretary's authority to *adopt* the compensatory payment regulation *in the first place*; [the] complaint did *not* attack his subsequent refusal to correct that alleged wrong." Thus, the issues raised in the lawsuit were *not* decided by the Secretary's denial of the petition for a rulemaking hearing. Moreover, as explained by Judge Scalia (*id.* at

This Court has expressly disapproved of analogous efforts to frustrate carefully constructed congressional schemes for orderly administrative and judicial review. See, *e.g.*, *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 21 (additional remedy against a different defendant precluded where Congress has created "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations"); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement"); *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375-376 (1979) ("If a violation of Title VII could be asserted through § 1985(3), * * * the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII"); *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976) ("The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. * * * Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible.").

Sanctioning consumer suits under the APA frustrates the "careful blend of administrative and judicial enforcement powers" (*Brown* v. *GSA*, 425 U.S. at 833) in a "detailed and specific" statutory scheme (*Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644

41a-44a), the administrative proceeding required by 7 U.S.C. 608c(15)(A) as a prerequisite to judicial review is an entirely different type of proceeding from the informal rulemaking hearing that respondents sought.

(1981)) that is "supervised by an expert administrative agency" (*City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981)). Thus, judicial review of market orders issued under the AMAA must be confined to suits brought by handlers in accordance with 7 U.S.C. 608c(15).

5. *Consumers' indirect interests may be adequately protected through handler-initiated review proceedings brought under 7 U.S.C. 608c(15)*. The absence of a right of judicial review for consumers does not mean that their interests (to the extent they are protected by the AMAA at all (see pages 34-43, *infra*)) will go unprotected. Instead, handlers are perfectly well situated to promote the indirect interests of consumers in market orders at the same time that they assert their own direct interests in regulations directly applicable to themselves. This Court has noted that handlers "seek only to obtain reliabl[e supplies of] milk at the cheapest price." *Zuber* v. *Allen*, 396 U.S. at 190. That consumer interests are truly derivative of handler interests—consumers complain that they pay more because handlers pay more—is shown by the fact that handlers and consumers asserted identical claims both in the instant case and in *Rasmussen* v. *Hardin*, *supra*. See Pet. App. 39a-40a (Scalia, J., concurring and dissenting). Whether handlers would pass on to consumers any cost savings they might secure through a successful challenge to the market order provisions in question is entirely speculative (see pages 46-49, *infra*), but, in any event, consumers' interest in market orders is limited to lowering the prices charged to handlers in the hope that consumers will then reap some benefit at the retail level. Thus, the interests of handlers and consumers in market orders are, from the standpoint of consumers, virtually identical.[16]

This identity of interests makes it unnecessary and inappropriate to grant consumers a right of direct review.

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[16] To the extent that consumers seek assurances of adequate supplies of milk, that objective, while possibly in conflict with their interest in lower prices, is also an objective of handlers. See *Zuber* v. *Allen*, 396 U.S. at 190.

See *Associated General Contractors of California, Inc.*, slip op. 23 (footnote omitted) ("The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.").

B. The Rationale For Inferring A Right Of Judicial Review At The Behest Of Producers, The Direct Beneficiaries Of The AMAA, Does Not Extend To Ultimate Consumers

The court of appeals concluded (Pet. App. 27a n.75) that preclusion of review at the behest of ultimate consumers could not be inferred from the AMAA's failure to mention consumer suits because the Act also is silent on the subject of producer suits, yet this Court authorized producers to challenge the administration of a milk market order fund in *Stark* v. *Wickard*, 321 U.S. 288 (1944). But that case is plainly distinguishable and lends no support to the court of appeals' decision here. In *Stark*, milk producers challenged certain deductions that were made from the "producer settlement fund" established in connection with a milk market order. In granting standing to the producers, even though Congress failed to give them an express administrative remedy or the right to judicial review, the Court pointed out that they had a proprietary interest in the fund, and that it "is because every dollar of deduction comes from the producer that he may challenge the use of the fund" (321 U.S. at 308). The Court also noted that the statute gives producers "definite personal rights," rights that are "not possessed by the people generally" (*id.* at 304, 309 (footnote omitted)).[17]

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[17] The lower courts have allowed producers to challenge market orders in analogous circumstances. See, *e.g.*, *Walmsley* v. *Block*,

Stark thus does no more than recognize that producers are the primary beneficiaries of the regulatory scheme. See *Zuber* v. *Allen*, 396 U.S. at 180-181; *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 22 (D.C. Cir. 1979); *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1067 n.3 (5th Cir. 1979); *Rasmussen* v. *Hardin*, 461 F.2d at 599. Moreover, producers are the only segment of society to which Congress gave a veto power over the adoption and retention of market orders. See 7 U.S.C. 608c(8), (9) and (16)(B); *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d at 22; *Suntex Dairy* v. *Bergland*, 591 F.2d at 1067. As the court noted in *Suntex Dairy*, 591 F.2d at 1067 n.3, producers and consumers stand on very different ground:

> We find the generalized interests of consumers in a marketing order totally different from the interests of producers. The statute goes to great lengths to guard the interests of producers by providing for administrative hearings and a ratification referendum. No such Congressional deference was shown consumers.

In addition, the interests of producers and handlers are generally antagonistic (see, *e.g.*, *Zuber* v. *Allen*, 396 U.S. at 173-174 & n.4; 79 Cong. Rec. 9490 (1935)), and thus producers, unlike consumers, cannot rely on handler-initiated review proceedings to protect their interests. Finally, as recognized in *Stark*, the regulatory framework often requires the Secretary to hold, allocate, and distribute funds that belong to producers. In such circumstances, it would be anomalous to conclude that Congress meant to foreclose all producer challenges to the market order program; indeed, Congress appears to have con-

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719 F.2d 1414 (8th Cir. 1983); *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979); *Blair* v. *Freeman*, *supra*; *Dairylea Cooperative, Inc.* v. *Butz*, *supra*. In all of these cases, as in *Stark*, the producers alleged direct injury in the form of a reduction in revenues that the AMAA was intended to provide for them. In contrast to consumer suits, therefore, producer suits do not thwart the basic purposes of the statute, and there is accordingly no basis for inferring a congressional intent to preclude them.

templated producer suits even though it did not authorize them expressly. See 79 Cong. Rec. 9479 (1935). By contrast, we have found no mention of consumer suits in the legislative history and debates, thus confirming the fact that consumers are simply outside the regulatory scheme and that Congress did not intend to permit them to upset it through litigation.[18]

II. RESPONDENTS FAIL TO SATISFY THE CONSTITUTIONAL AND PRUDENTIAL REQUIREMENTS OF THE STANDING DOCTRINE

Assuming arguendo that Congress did not preclude *all* consumer suits under the AMAA, nevertheless the court of appeals erred in concluding that the consumer respondents in this case have standing to maintain their challenge to the market order provisions at issue. The various elements of the standing doctrine were thoroughly set forth in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). There the Court held that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the

[18] It is also worth noting that the disruptive potential arising out of producer suits such as that authorized in *Stark* is far less than the disruption likely to be caused by consumer suits of the type sanctioned by the decision below. Milk market orders only become effective with the agreement of at least two-thirds of the affected producers (see page 7, *supra*), and only remain in effect so long as a majority of producers continue to approve of them (see 7 U.S.C. 608c(16)(B)). Thus, producer suits challenging such orders will be relatively infrequent. Producer suits also are ordinarily limited to challenges to individual market orders. Consumers, on the other hand, could conceivably assert an "interest" in challenging every market order because, by legislative design, they would have played no formal role in devising the orders; moreover, as in this case, consumers could attack market orders nationwide, thus greatly increasing the disruptive potential of litigation.

challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." *Valley Forge*, 454 U.S. at 472 (footnote omitted). In addition, the Court has adhered to a number of prudential considerations bearing on the question of standing. Thus, "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches" (*id.* at 475) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975)). And "the Court has required that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question'" (*Valley Forge*, 454 U.S. at 475) (quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). The consumer respondents fail to satisfy these requirements.

Respondents alleged two injuries in their complaint. First, they claimed that the market orders deprive them of a nutritious, low-cost substitute for regular fluid milk. Second, they claimed that by making reconstituted fluid milk uneconomical for handlers to produce, the orders deprive consumers of a "stabilizing market influence" that could operate to offset seasonal fluctuations in the supply of regular fluid milk.[19] Respondents' first asserted injury

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[19] Specifically, respondents described their alleged injuries as follows (J.A. 16, 17):

> 28. The economic barriers to marketing reconstituted milk created by the existing Orders deprive plaintiffs Weinberg, Harrel, and Desmarais and other consumers of access to a nutritious dairy beverage at a lower price than fresh drinking milk.
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> 31. The existing Orders deprive producers and consumers of a stabilizing market influence. A reconstituted fluid product could quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply. Tight fluid markets and rising fluid prices could be avoided and the size of the reserve fresh whole Grade A milk needed to provide the fluid market could be reduced if such adjustments were possible.

lies outside the zone of interests arguably protected by the AMAA, while the second asserted injury fails to satisfy the constitutional requirement of injury in fact. Moreover, the complaint as a whole fails to satisfy the Article III requirement of redressability and the prudential prohibition against the litigation of generalized grievances.

A. Respondents' Interest In A Lower Price For One Type Of Fluid Milk Is Outside The Zone Of Interests Protected By The AMAA

Respondents' allegation that the market order provisions at issue deprive them of a low-cost substitute for regular fluid milk fails to satisfy the zone of interests requirement. The primary purpose of the AMAA is to protect dairy farmers;[20] the express purpose of the market order provision (7 U.S.C. 608c) is "to *raise* producer prices." S. Rep. 1011, *supra*, at 3 (emphasis added). Thus, as the Ninth Circuit noted in *Rasmussen* v. *Hardin*, 461 F.2d at 599, consumers' interests in lower prices not only are not within the scope of Congress's concern, but are actually contrary to the legislative design. See 79 Cong. Rec. 9471 (1935).

The court below totally disregarded Congress's purpose in enacting the AMAA when it held that consumers' interests in lower prices for reconstituted fluid milk fall within the Act's zone of interests. The court of appeals' error was twofold—first, it relied on isolated statutory references to consumers that, when analyzed, do not support the court's conclusion, and, second, it eschewed any

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[20] Confirmation of Congress's solicitude for farmers is apparent from the Act's requirement that at least two-thirds of the dairy farmers in an affected region must approve a proposed market order before it may take effect (7 U.S.C. 608c(8)). This requirement operates even in the face of opposition from affected handlers if "such order is the only practical means of advancing the interests of the producers" (7 U.S.C. 608c(9)(B)). Moreover, if producers become dissatisfied with an order they, unlike handlers, may require the Secretary to terminate it (7 U.S.C. 608c(16)(B)).

resort to the legislative history to elucidate the statute's meaning.

1. The court of appeals' conclusion on the zone of interests issue rested on two policy sections of the AMAA that merely reference consumers. First, the court cited 7 U.S.C. 602(2), which provides that it is the policy of Congress:

> [t]o protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

It is difficult to understand how this section's reference to consumers supports the result reached by the court of appeals. In the quoted section, Congress called upon the Secretary to *increase* prices as rapidly as the public interest would permit; it acted to protect the interest of consumers only to the extent that that interest was consistent with the pricing policy for farmers established in 7 U.S.C. 602(1). That section's declared policy is to establish parity prices for farmers. As the court of appeals itself noted, 7 U.S.C. 602(2) "expresses Congress' intent to protect consumers against *unwarrantably rapid or excessive* price increases by limiting the Secretary's authority to fix prices at parity and no higher" (Pet. App. 20a (emphasis added; footnote omitted)). Clearly, that legislative intent has nothing to do with respondents' asserted interest in *lowering* prices for reconstituted fluid milk.[21]

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[21] The Department of Agriculture advises us that throughout the entire history of the AMAA, the blend prices paid to producers

The court of appeals also relied on 7 U.S.C. 602(4), which expresses a policy of protecting producers and consumers against "unreasonable fluctuations in supplies and prices." See Pet. App. 22a-23a. Again, this section does not support the consumer respondents' asserted interest in *lower* prices; and respondents have never alleged that the challenged market order provisions subject them to unreasonable *fluctuations* in prices.[22]

The statutory references to consumers, therefore, are insufficient to bring the asserted interests of the consumer respondents in this case within the zone of interests to be protected by the AMAA. Careful analysis of the statutory sections themselves, erroneously eschewed by the court of appeals, reveals that lower prices for consumer products were simply not an interest that Congress acted to protect. And, as the district court noted (Pet. App. 63a-64a), "[n]either the question of price increases nor the issue of parity pricing is implicated in this case."

2. Equally important, the court of appeals plainly erred in disregarding the statute's legislative history (Pet. App. 21a-23a). As this Court has recognized, " 'there certainly can be no "rule of law" which forbids [reference to legislative history], however clear the words may appear on "superficial examination." ' " *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940)). Here, "superficial examination" of the statute does indeed show that "consumers" are mentioned in the Act; but closer analysis of the legislative history demonstrates that the

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under the market orders have rarely, if ever, reached parity. For at least the last several years, the blend prices paid under all orders have been below parity. Thus, even the limited protection that Congress may have intended for consumers is not implicated by the realities of the regulatory program.

[22] Respondents have made loose allegations concerning fluctuations in the *supply* of milk. As we demonstrate below, however, those allegations are insufficient to establish standing in this case (see pages 43-45, *infra*).

interests asserted by the consumers in *this* litigation were never within the contemplation of Congress. While resort to legislative materials may not always be necessary, it is surely erroneous to require that a court avert its gaze from legislative history demonstrating that arguable inferences from the face of the statute are manifestly at odds with the meaning Congress intended to convey by the words it used.[23]

As previously noted, the legislative history of the

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[23] The court of appeals refused to examine any legislative history in its consideration of the zone of interests test in reliance on its earlier decision in *Tax Analysts & Advocates* v. *Blumenthal, supra* (Pet. App. 22a). There the court concluded that "full-scale examination of legislative history" (566 F.2d at 141) should be avoided in applying the zone of interests test because (1) it could lead to a premature judgment on the merits, (2) the legislative history is not likely to be illuminating on the zone of interests question, and (3) full scale examination of the legislative history could undermine the "generous" nature of the zone test. *Id.* at 141-142. While we question the validity of any rule of interpretation that requires a court to eschew examination of pertinent legislative history, we note that the court in *Tax Analysts* did not purport to create an absolute rule. Instead, the court stated (*id.* at 143 n.30 (emphasis in original)):

> We do not rule out *any* role for legislative history at this stage, and we would expect to be informed by the parties if the legislative history contained clear evidence of an intent either to allow the appellant's interests as a basis for standing or to deny standing to a party in this position.

Even this limited acknowledgment of the pertinence of legislative history is, we submit, too narrow, but it is worth noting that in subsequent cases the District of Columbia Circuit has in fact examined the relevant legislative history in applying the zone of interests test. See, *e.g.*, *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 55-57 (D.C. Cir. 1983); *Copper & Brass Fabricators Council, Inc.* v. *Dep't of the Treasury*, 679 F.2d 951, 952-953 (D.C. Cir. 1982); *Control Data Corp.* v. *Baldrige*, 655 F.2d 283, 294-296 & nn.23-25 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981). Other circuits also examine the pertinent legislative history when applying the zone test. See, *e.g.*, *Peoples Gas, Light & Coke Co.* v. *United States Postal Service*, 658 F.2d 1182, 1195-1196 (7th Cir. 1981); *In re Swearingen Aviation Corp.*, 605 F.2d 125, 126-127 (4th Cir. 1979). This Court did likewise in *Barlow* v. *Collins*, 397 U.S. at 164-165 & n.7.

AMAA clearly reveals that the essential purpose of market orders is "to raise producer prices." S. Rep. 1011, *supra*, at 3; see also H.R. Rep. 1241, 74th Cong., 1st Sess. 7 (1935); S. Rep. 548, 74th Cong., 1st Sess. 3 (1935); H.R. Rep. 952, 74th Cong., 1st Sess. 2 (1935). The legislative history of the statute as originally enacted in 1933 explains Congress's view that raising producer prices would benefit consumers as well as farmers (H.R. Rep. 6, 73d Cong., 1st Sess. 7 (1933)):

> In the long run, consumers can not expect to buy any product at a price which represents less than a fair return to the labor and capital involved in producing the commodity. The ultimate danger to the consumer in the present extremely low prices for agricultural products is that, if continued, they will shortly result in the ruin of our agriculture and it will eventually be necessary to pay unduly higher prices before it can be restored. The consumer as well as the farmer and the business man has everything to gain from a fair and balanced relationship between production and consumption that will restore to agricultural commodities their pre-war purchasing power. The present economic emergency is in large part the result of the impoverished condition of agriculture and the lack of ability of farmers to purchase industrial commodities.[24]

When it amended the AAA in 1935, Congress enacted what is now 7 U.S.C. 602(2), one of the two statutory provisions mentioning consumers and relied upon by the court of appeals. The legislative history of that section makes plain that the safeguards Congress intended for consumers were to extend no further than protecting them against price increases above the parity level (H.R. Rep. 1241, *supra*, at 3 (emphasis added)):

> Subsection (3) of the "Declaration of policy" contained in the present act [the AAA], which was in-

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[24] See also 79 Cong. Rec. 9460 (1935) ("These increased prices were necessary to restore the purchasing power of the farmer in the interest of the common welfare of the country"); 79 Cong. Rec. 9594-9595, 9608, 9610 (1935) (same).

> serted in order to protect consumers against unwarrantably rapid or excessive price increases, is ambiguously worded and has met with some criticism from the courts as being a vague and unintelligible standard, from which the Secretary can derive no adequate guide in the exercise of his powers. *This language has, accordingly, been reworded to make it clear that the act confers no authority upon the Secretary to utilize his powers in order to maintain farm prices above the parity level.*

In short, the legislative history of Section 602(2) confirms the plain reading of the statutory language, which itself demonstrates that consumers' interest in lower prices was not an interest Congress meant to protect.

To an even greater extent, the same is true of 7 U.S.C. 602(4), the other statutory provision that references consumers. As pointed out in the "undeniably thorough" analysis by the district court (Pet. App. 22a), Section 602(4) was enacted in 1954 as an amendment to the AMAA, in response to totally different problems from those addressed by Congress in 1935 (Pet. App. 62a-63a (emphasis added)):

> The 1954 amendments were enacted to counter the falling farm prices caused by the surplus of commodities after the Korean Conflict. H.R. Rep. No. 1927, 83rd Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Ad. News 3399, 3401. The amendments dealt primarily with price supports and parity pricing. *Id.* at 3399-3400. The House Report on the Act made it clear that the interests of consumers were being taken into account in dealing with these issues. This concern was expressed in terms of the importance of price stability, *id.* at 3407, and abundance of supply. *Id.* at 3402. The Report also makes it clear that farm prices are in large measure independent of the prices consumers pay. *Id.* at 3404.
>
> Nowhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities. Indeed, the Orders are not even a sig-

nificant part of the 1954 Act. *The comments on consumers in the legislative history seem primarily aimed at dispelling the misconception that the flexible price-support program embodied in the bill would materially lower consumer prices. See* House Report, *supra*, at 3404.

The district court was clearly correct in its analysis of Section 602(4). The Senate Report explains that the section (S. Rep. 1810, 83d Cong., 2d Sess. 8 (1954))

> would authorize the continuous operation of marketing agreements and orders, even though prices might be above parity, if necessary to provide an orderly flow to market throughout the marketing season without unreasonable fluctuations in supplies and prices. At present programs must be discontinued when the parity objective is achieved.

See also H.R. Rep. 2664, 83d Cong., 2d Sess. 24 (1954). In essence, then, Section 602(4) was intended to *reduce* the already limited price protection for consumers provided in Section 602(2) by authorizing the Secretary to establish market order prices *above* parity in order to maintain orderly marketing conditions. The legislative history thus reinforces the conclusion that the AMAA's references to consumers, even if meant to be more than "pious platitudes" (*Rasmussen* v. *Hardin*, 461 F.2d at 599), were never intended to advance the goals asserted by respondents in this litigation.

3. The zone of interests test serves an essential function in the demarcation of the proper roles for courts and legislatures. The prudential limitations on standing, including the zone test, stem from "concerns 'about the proper—and properly limited—role of the courts in a democratic society.'" *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978) (quoting *Warth* v. *Seldin*, 422 U.S. at 498). As the Court has explained (*id.* at 500):

> Without such [prudential] limitations—closely related to Art. III concerns but essentially matters of

> judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions * * *.

Similarly, the District of Columbia Circuit has recognized that one function of the standing doctrine is "to define the proper judicial role relative to the other major governmental institutions in the society." *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d at 139 (footnote omitted). See generally *Valley Forge*, 454 U.S. at 472, 473-474. The zone test is particularly well suited to that purpose (*Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d at 140 (footnote omitted)):

> The zone test, by its very language, implicates the relationship between the legislative and judicial branches as the predominant factor in its operation—"the zone of interests to be protected or regulated by the *statute* . . . in question." Thus, the zone test serves the purpose of allowing courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

In the present case, there can be no doubt that the exercise of judicial power at the instigation of the consumer respondents is "not congruent with the mandate" of Congress as embodied in the AMAA. To the extent respondents are dissatisfied with the purposes of the AMAA and believe that the Act should be altered to give greater weight to their interests, respondents have a remedy, but it lies with Congress rather than with the courts. The courts overstep their "properly limited" role when they undertake to resolve grievances that stem from dissatisfaction with choices made by Congress in the exercise of its legislative judgment. The zone of interests test is properly employed, therefore, to deny standing to parties

seeking to advance interests that are inconsistent or incongruent with the interests Congress intended to promote[25] (see, *e.g.*, *Copper & Brass Fabricators Council, Inc.* v. *Dep't of the Treasury*, 679 F.2d at 953; *Control Data Corp.* v. *Baldrige*, 655 F.2d at 295), or that go further than the limited protection that Congress may have intended for a particular interest (see, *e.g.*, *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759, 766 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977)).[26]

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[25] In *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d at 142 n.76, the court of appeals observed that there was some confusion surrounding the question of which interests are relevant to the zone test. While we fail to understand the basis for the confusion, we agree entirely with the court's resolution of the question (*ibid.*):

> Essentially the confusion surrounds what exactly has to fall within the relevant zone: 1) the parties themselves; 2) the interests of the parties in general; or 3) the particular interest the parties are asserting in the litigation. It seems clear to us that the particular interests are the relevant interests in the context of an application of the zone standard. Professor Davis agrees. [K. Davis, *Administrative Law Treatise* § 22.00-1 (Supp. 1970)]

In this case, therefore, the fact that respondents are consumers is irrelevant for standing purposes, as is the fact that they may possess a general interest in the price of food. Rather, the relevant focus is on their interest in lower retail prices for reconstituted milk and the relationship of that interest to the purposes of the AMAA.

[26] *Rodeway Inns* is particularly relevant to the instant case. There, the court was confronted with a statute that did provide limited protection for the plaintiff group, but not for the interest sought to be asserted in the litigation. In denying standing, the court stated (541 F.2d at 766 (emphasis added)):

> We cannot conclude that two provisions which protect the interests of potential competitors in limited situations were intended by Congress to confer standing on competitors to challenge action taken under the [National Housing Act] not falling within the areas protected by those two particular provisions. * * * The provisions protecting hotel owners are of limited application only; *it is not our prerogative to expand*

Here, respondents assert an interest (lower retail prices) that is at best essentially unrelated to, and at worst the direct opposite of, what Congress intended to achieve (higher prices for farmers). The zone of interests test clearly bars standing under these circumstances.[27]

B. Respondents Cannot Demonstrate Injury In Fact Caused By Any Fluctuation In Milk Supplies

The court of appeals also erred in concluding that the consumer respondents satisfactorily established their standing to maintain this suit through their allegation that the market order provisions at issue "deprive producers and consumers of a stabilizing market influence" (J.A. 17). Ensuring stable market conditions *is* an express purpose of the statute (see 7 U.S.C. 602(4)), and thus this facet of respondents' asserted injury is arguably within the Act's zone of interests.[28] The problem here,

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the scope of hotel owners' interests beyond the zones of protection defined by Congress.

So too, it is not the proper function of the judiciary to expand upon the limited protection Congress intended to provide for consumers in the AMAA.

[27] As noted at the outset (see page 17, *supra*), respondents brought this action under the Administrative Procedure Act. That Act grants standing only to persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute* * * *" (5 U.S.C. 702 (emphasis added)). The plain language of the APA thus incorporates a "zone of interests" test that respondents cannot meet; assuming, arguendo, that respondents have suffered injury at all, it is, as we have shown, injury that is not cognizable within the meaning of the AMAA.

[28] The legislative history indicates, however, that, as with prices, Congress's intention to promote market stability was meant to protect *farmers* rather than consumers. See H.R. Rep. 1241, *supra*, at 10 (emphasis added) ("In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply *with their attendant disturbing effect upon returns to producers*, and to encourage a uniform volume of production throughout the year, an adjustment in payments to producers" may be made.). See also *Suntex Dairy* v. *Bergland*, 591 F.2d at 1064-1065 (emphasis added)

however, is that respondents essentially did no more than parrot the language of the statute. Even then, their allegation of injury was entirely speculative and hypothetical; they asserted that "[a] reconstituted fluid product *could* quickly expand the fluid milk supply when seasonable changes result in a reduction of the whole fluid milk supply" (J.A. 17 (emphasis added)). Plainly, this is insufficient to demonstrate the constitutionally-required injury in fact. Respondents did not allege that they (or, for that matter, any other consumers) have ever been or are likely to be subjected to shortages in fluid milk supplies due to seasonal variations in production. This is a fatal defect. See *Warth* v. *Seldin*, 422 U.S. at 498-499, 504.

Moreover, any allegation that the consumer respondents have in fact suffered or are likely to suffer from seasonal shortages would be untenable. There are indeed seasonal fluctuations in the production of milk, but a number of regulatory mechanisms operate to prevent those fluctuations from affecting ultimate consumers.[29]

("The blend price mechanism established by a milk marketing order acts as a stabilizing influence that insulates *farmers* from the buffeting of prices that would otherwise accompany differences in consumer demand.").

[29] Many market orders establish a "base" system for allocating payments from handlers to producers. See 7 U.S.C. 608c(5)(B); H.R. Rep. 1241, *supra*, at 9-10. Adjustments to the base system may authorize higher payments for milk produced during seasonal low periods and thus provide incentives to counteract fluctuating production levels. *Id.* at 10. Second, the price paid to rural producers may include a premium to provide them with an incentive to ship their milk to city markets whenever necessary. *Id.* at 9-10. Third, the price support system, an entirely separate statutory scheme regulating milk production (see 7 U.S.C. 1421-1449), has kept the supply of milk high year round. In fact, since the fall of 1979, there has been a dramatic increase in milk production without a concomitant increase in demand. See *State of South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 877-878 (4th Cir. 1983), petition for cert. pending, No. 83-1215; 48 Fed. Reg. 34943 (1983). During fiscal year 1982, the government purchased nearly $845 million in surplus milk products under the price support system. As a result

Under these circumstances, respondents were required to come forward with facts supporting their claimed injury. They utterly failed to do so with respect to their market stabilization claim, and that claim must therefore be disregarded as "unadorned speculation" (*Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976)). See *Warth* v. *Seldin*, 422 U.S. at 501-502.

C. Respondents Are Attempting To Litigate A Generalized Grievance More Appropriately Addressed By Congress

The court of appeals recognized that the interests asserted by the consumer respondents in this case are widely shared (Pet. App. 25a); indeed, those interests appear to be shared by virtually every household in the country, a class even larger than that of all taxpayers. Nevertheless, the court of appeals concluded that dismissal of the suit on "generalized grievance" grounds would mean that consumer suits would never be justiciable (*ibid.*). As this Court has held, however, "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" *Valley Forge*, 454 U.S. at 489 (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974)). Even if this were not so, the court of appeals was clearly wrong in the context of this case. As stressed by Judge Scalia in dissent (Pet. App. 38a-40a), consumer interests in milk market orders are entirely derivative of handlers' interests and can be fully protected by handlers' suits (brought after proper exhaustion of administrative remedies). Handlers are the "litigants best suited to assert [the] particular claim" that is here only indirectly shared by the consumer respondents. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979).

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of these various factors, there is no experience within general knowledge or subject to judicial notice of a shortage of fluid milk at the consumer level due to seasonal fluctuations in production.

Moreover, Congress, when it chooses, can and does overcome prudential limitations on standing such as the generalized grievance doctrine by extending standing to any person adversely affected or aggrieved by the challenged action. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100; see also Sedler, *Sanding and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 Rutgers L. Rev. 863, 876-885 (1977). As we have already demonstrated, however, Congress has not chosen to do so in the AMAA. If the consumer respondents in this case are held to have standing, the effect would be to add a boundlessly latitudinal "person aggrieved" standing provision to the AMAA. Granting standing to consumers whose interests are indirect and shared in common with virtually every household in the nation would undermine the statutory scheme enacted by Congress and would disrupt a massive program that has stability as a primary goal. See, *e.g.*, 7 U.S.C. 601. Such a dramatic change in a regulatory program of 50 years' duration is "most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475.

D. Respondents Cannot Demonstrate That Their Injury, If Any, Is Redressable By A Court

To establish standing, a litigant must demonstrate that his individualized injury " 'is likely to be redressed by a favorable decision' " (*Valley Forge*, 454 U.S. at 472 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38)) and that he "personally would benefit in a tangible way from the court's intervention" (*Warth* v. *Seldin*, 422 U.S. at 508 (footnote omitted)). Standing is not established when it is "speculative whether the desired exercise of the court's remedial powers" would benefit the plaintiff. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 43; see *id.* at 44-46.

Here, it is entirely speculative whether the pocketbooks of the nation's consumers would be augmented in

any way by upholding respondents' challenge to the milk market orders. Congress has recognized that retail prices paid by consumers are largely independent of the wholesale prices paid to farmers. H.R. Rep. 1927, 83d Cong., 2d Sess. 7, 9 (1954). Any connection between amendment of the market orders and lower retail prices at the consumer level, therefore, is "at best speculative and at worst nonexistent." *Valley Forge*, 454 U.S. at 480 n.17. As the district court explained (Pet. App. 61a):

> There are too many variables which would have an effect on consumer prices if the Market Orders were changed. These variables include: whether handlers pass the cost savings on to consumers; whether the change causes a substantial market dislocation, leading to higher overall milk prices; whether increased demand for milk powder will increase its price; whether handlers would dry milk merely to evade the regulations. This situation is, as the Preliminary Impact Statement, 45 Fed. Reg. 75,956 (1980), indicates, extremely complex, and any benefit to the plaintiffs from the proposed changes in the regulations is hypothetical and speculative.[30]

The court of appeals disagreed with these observations based solely on the Department of Agriculture's preliminary impact analysis of respondents' proposal (45 Fed. Reg. 75956 (1980)), which the court read as showing

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[30] Congress recognized these same factors as early as 1935. During debate on the 1935 amendments to the AAA, the following colloquy occurred (79 Cong. Rec. 9470 (1935)):

> Mr. ZIONCHECK: * * * Is there any provision in the bill for a maximum cost to the consumer?
>
> Mr. DOXEY: If the gentleman can show us how we can fix a maximum cost to the consumer, after the many people through whose hands the commodity passes, I am sure as one Member I would be grateful for his contribution. No; there is nothing in the bill which fixes a maximum cost to the consumer. That is to be left to competition and the law of supply and demand.

that the immediate (*i.e.*, within three years) impact of adopting respondents' proposal would be to save consumers nationwide $186 million annually (Pet. App. 17a). But the court misunderstood the impact analysis. In fact, the analysis offers no evidence regarding the likely behavior of the many nonregulated parties intervening between producers and ultimate consumers, whose actions necessarily determine the redressability of respondents' grievance. Rather, for purposes of studying respondents' proposal, the Secretary analyzed the impact on the producer-through-consumer chain as if all independent, intervening variables would operate to the benefit of consumers. The Secretary's impact analysis states that it took this approach because it was impossible to measure or predict accurately the future actions of the intervening third parties (see 45 Fed. Reg. 75960, 75963 (1980)). Thus, the Secretary assumed that all wholesale cost savings would be passed through to retail prices,[31] that consumers would accept manufacturer-reconstituted milk, that it would be made available by wholesalers and retailers in fresh milk markets,[32] and that state regulations would not prohibit its sale.[33] Ac-

[31] The preliminary impact statement reports that in its analysis "farm to retail margins are held constant." 45 Fed. Reg. 75963 (1980).

[32] With respect to consumer acceptance and availability, the impact analysis states (45 Fed. Reg. 75960 (1980)):

> While the model does make it possible to estimate a broad range of economic impacts, others cannot be measured because no data are available. The most important of these is the acceptability of reconstituted milk by consumers and the extent to which such a product would be sold in each of the fresh milk markets across the U.S.

[33] The impact analysis notes that 15 states prohibit the manufacture and sale of reconstituted milk in whole or in part and an additional ten states regulate its price (45 Fed. Reg. 75962 (1980)). The analysis further states (*id.* at 75963):

> Because it is not possible to measure the potential impact of state regulation on the alternative proposals, this analysis relies

cordingly, the preliminary impact analysis merely confirms the speculative nature of any assumption that a change in the market orders would benefit consumers, and it cannot satisfy the Article III requirement of redressability.

Finally, because the redressability of respondents' indirect injury is unrelated to the merits of their claim, it is essential that they be required to demonstrate that a court's intervention will result in some tangible benefit to them *before* they call upon the judiciary to oversee the extraordinarily complex market order system administered by the Secretary. At minimum, therefore, the court below erred in remanding this case for a decision on the merits when respondents have not yet shown (even to the court of appeals' satisfaction (see Pet. App. 18a-19a)) that a judgment in their favor would produce the relief they seek. Requiring respondents to establish their standing before trial is particularly important in this case because a trial on the merits would likely be devoted to issues wholly unrelated to respondents' standing. Indeed, the court of appeals itself recognized that the questions to be resolved on the merits are narrow in scope (Pet. App. 34a n.95 (emphasis in original)): "The compensatory payment regulation should be sustained if it is within the Secretary's granted power, issued pursuant to proper procedure, and supported by adequate evidence and reason *when adopted*." In these circumstances, a trial on the merits is not likely to produce any evidence supportive of respondents' standing allegations. As a result, respondents should not be allowed to proceed until and unless the defects in the standing allegations

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upon * * * impacts that would be expected in the absence of state regulations to prevent the sale of reconstituted milk.

* * * * *

Because the likelihood of success of such efforts [to change state restrictions] is impossible to predict or measure, no estimates of their impacts are presented.

have been corrected. See *Warth* v. *Seldin*, 422 U.S. at 501-502.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

LEONARD SCHAITMAN
SUSAN SLEATER
Attorneys

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